SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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DERAY MCKESSON,

Plaintiff,

- v -

JEANINE PIRRO and FOX NEWS NETWORK, LLC

Defendants.

INDEX NO. 160992/2017

MOTION DATE 10/23/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for DISMISSAL.

Based on the papers and after hearing oral argument, the motion by Defendants Jeanine Pirro and Fox News Network, LLC (collectively, "Defendants") to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and 7, is granted for the reasons stated herein.

BACKGROUND

I. The Parties

Plaintiff DeRay Mckesson ("Mckesson") is a civil rights activist and co-founder of Campaign Zero, "a non-profit creating policy and advocacy to end police violence." (Complaint ¶ 12.) Mckesson regularly speaks at events and conferences around the world and served as the Interim Chief Human Capital Officer for Baltimore City Public Schools. (Id.) As of the writing of this decision, McKesson is listed as having over one million Twitter followers.

Defendant Jeanine Pirro ("Pirro") is a former Westchester County District Attorney and a former Westchester County judge. She currently hosts the show "Justice with Jeanine" on the Fox News Channel.[1] Defendant Fox News Network,

[1] The Court takes notice that Pirro is currently suspended from hosting her show—which has no bearing on the instant matter.

LLC ("Fox News") operates the Fox News Channel, a 24-hour cable television news channel in the U.S. that produces the shows "Justice with Jeanine" and "Fox & Friends." (Complaint ¶ 14.) As of the writing of this decision, Pirro is listed as having roughly 1.4 million Twitter followers.

II. The Allegedly Defamatory Statements

This action arises from allegedly defamatory statements made by Pirro about Mckesson on the television show FOX & Friends on September 29, 2017 concerning two lawsuits stemming from events at a July 9, 2016 Black Lives Matter demonstration in Baton Rouge, Louisiana ("the Baton Rouge Protest").

On that morning, FOX & Friends began the subject segment with a video of a crowd of individuals holding "Black Lives Matter" signs and chanting, "Pigs in a blanket, fry them like bacon." (Affirm in Supp., Ex K [Fox & Friends Video].) The headline "JUDGE RULES BLACK LIVES MATTER CAN'T BE SUED" appeared at the bottom of the screen. The top left corner of the screen noted that the footage was from St. Paul, Minnesota on August 29, 2015.

The following, roughly two-minute colloquy—which is the basis of Mckesson's defamation allegations—then transpired between Pirro and the show's hosts Steve Doocey and Brian Kilmeade:

(Transcription of colloquy on next page.)

Transcription of colloquy in video:

"STEVE DOOCY: All right. There you've got a Black Lives Matter demonstration a while back in St. Paul, Minnesota.

Joining us right now is the host of Justice, Judge Jeanine Pirro. Judge, let's talk a little bit about how a police officer anonymously sued Black Lives Matter because he was at a demonstration where he was injured by -- somebody threw a rock or a bottle or something like that and now a judge has come out and made it very clear, you can't sue Black Lives Matter. Why?

JEANINE PIRRO: Right. The judge says you can't sue Black Lives Matter because it's an organization like the Civil Rights Movement, like the Tea Party, it doesn't have a governing body, it doesn't have bylaws –

STEVE DOOCY: Too general?

JEANINE PIRRO: -- it doesn't have – yeah, it's too much -- it's too amorphous.

And yet the plaintiff in this case said, look, these people have meetings, it's an unincorporated association, they have national chapters, they solicit money, ***and in this particular case, DeRay Mckesson, the organizer, actually was directing people, directing the violence***, directing --

STEVE DOOCY: So can you sue him?

JEANINE PIRRO: Yeah, you can sue him. But guess what, the judge said, you know what, he was engaging in protected free speech.

Now, I want you to guess who appointed this federal judge.

BRIAN KILMEADE: Ronald Regan?

JEANINE PIRRO: No.

BRIAN KILMEADE: Didn't think so.

JEANINE PIRRO: Barack Obama. And you know what, the amazing part of this is that DeRay Mckesson and several -- I think it's about 90 of the people who were protesting -- there is the federal judge right there[2] -- actually got $100,000 from the City of Baton Rouge because Baton Rouge they said was very offensive to them and they -- the police were militarized. And although no one was injured --

STEVE DOOCY: Uh-huh.

JEANINE PIRRO: -- they felt that their civil rights were violated. What is wrong with this country today? The problem is when you have federal judges who make decisions –

STEVE DOOCY: Activists?

JEANINE PIRRO: -- based on politics -- activist judges -- and *not on the facts.* ***You've got a police officer who was injured, he was injured at the direction of DeRay Mckesson, DeRay Mckesson walks away with $100,000*** for an organization that is amorphous. We got a problem in this country."

(FOX & Friends Video [emphasis as in complaint]; Ex. J [Transcript of Video][3].)

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[2] A photograph of Hon. Brian Jackson, U.S.D.J., was displayed on screen at this moment.

[3] The Court has used the transcript attached as Exhibit J as an aid in transcribing the dialogue. However, the above transcription is based on the Court's own review of the video (submitted as Ex. K to the Defendants' motion papers) and is not a reproduction of the transcript submitted as Exhibit J.

III. The Underlying Lawsuits Discussed on FOX & Friends

A. The Police Officer Injury Action

With regard to Pirro's commentary concerning the dismissal of a lawsuit brought against Mckesson and Black Lives Matter at the beginning of the sequence, Pirro was referring to the case of *Doe v Mckesson*, No. 3:16-cv00742, before Judge Brian A. Jackson in the United States Court for the Middle District of Louisiana ("the PO Injury Action"). (Affirm. in Supp., Ex. F [PO Injury Complaint].)

As is referred to in the instant complaint and the papers submitted on this motion, the Baton Rouge Protest was prompted by the July 5, 2016 shooting death of Alton Sterling by Baton Rouge police officers. (Complaint ¶¶ 15-16.) Mckesson was among other protesters who attended the Baton Rouge Protest on July 9, 2016.

According to the PO Injury Complaint, during the Baton Rouge Protest, a Baton Rouge police officer, pseudonymously named "John Doe" (herein, "the plaintiff-officer") was allegedly struck by "a piece of concrete or similar rock" thrown by an unidentified demonstrator causing the plaintiff-officer to sustain serious injuries to his head. (PO Injury Complaint ¶¶ 20-21.)

The PO Injury Complaint named Mckesson and Black Lives Matter as defendants and asserted that they were liable for the plaintiff-officer's injuries under theories of negligence and respondeat superior. In particular, the PO Injury Complaint alleges that Mckesson "le[d] the protest and violence that accompanied the protest" (id. at ¶ 3), that Mckesson "was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests" (id. at ¶ 17) and that he "did nothing to calm the crowd and, instead, he incited the violence" (id. at ¶ 19). The PO Injury Complaint further alleges that the protest "turned into a riot" and that protesters engaged in looting and throwing water bottles at police officers, and that at some point "a member of Defendant BLACK LIVES MATTER, under the control and custody of the DEFENDANTS, then picked up a piece of concrete or similar rock like substance and hurled [it] into the police that were making arrests[,]" striking the plaintiff-officer in the face. (Id. ¶¶ 20-21.) The PO Injury Complaint further alleges that "DEFENDANTS have similarly attacked other businesses and other persons while protesting/rioting." (Id. ¶ 22.)

Thereafter, Mckesson moved to dismiss the PO Injury Complaint. With regard to Black Lives Matter, Mckesson argued that Black Lives Matter was a social movement and "not a juridical entity capable of being sued." (*Doe v Mckesson*, 272 F Supp 3d 841, 849 [MD La. 2017].) With regard to himself, Mckesson argued, among other things, that under the seminal First Amendment case *NAACP v Claiborne Hardware Co.*, (458 US 886 [1982]), he could not be held strictly liable for the violent actions of a rogue protester and that the plaintiff-officer failed to allege sufficient non-conclusory, factual details to sustain a cause of action. The plaintiff-officer opposed and filed a separate motion to amend the complaint with a proposed amended complaint attached (the "Proposed Amended PO Injury Complaint") as an exhibit to that latter motion.

The Proposed Amended PO Injury Complaint asserted, in relevant part, the following additional allegations concerning Mckesson:

> "DeRay McKesson, the leader of Black Lives Matter, authorized, directed, and ratified specific tortious activity, which would justify holding him responsible for the consequences of that activity.
>
> DeRay Mckesson was directing the activity of the protestors to incite lawless actions, including blocking of a public highway and allowing protestor to the throw objects at the police, which justifies holding him liable for the unlawful conduct that cause injuries."

(Affirm. in Supp., Ex. G [Proposed Amended PO Injury Complaint] ¶¶ 65-66.)[4] Referring to a statement allegedly made by Mckesson to the New York Times *after* the Baton Rouge protest—also quoted in the original complaint—that "[t]he police want protesters to be too afraid to protest[,]" the plaintiff-officer asserted that this statement suggested Mckesson "ratified the conduct at the prior protest, including violating the law and throwing objects at police from Baton Rouge." (Id. ¶ 41.)

On September 28, 2017, Judge Jackson dismissed the PO Injury Action with prejudice and denied the plaintiff-officer's motion to amend the complaint, finding that the Proposed Amended PO Injury Complaint failed to remedy the deficiencies in the original PO Injury Complaint. Judge Jackson dismissed the cause of action

[4] The Proposed Amended PO Injury Complaint also states that the plaintiff-officer and his colleagues "managed to block the effort of McKesson to lead the protesters [onto highway] I-12," (Proposed Amended PO Injury Complaint ¶ 36), thereby alleging details as to the proximity between Mckesson and the plaintiff-officer that were not provided in the original PO Injury Complaint.

against Black Lives Matter because "it is not a 'juridical person' that is capable of being sued." (*Doe v Mckesson*, 272 F Supp 3d 841, 850 [MD La 2017].) Analyzing the claims against Mckesson under *NAACP v Claiborne Hardware Co.*, (458 US 886 [1982]), the court found that the complaint was "devoid of any facts, aside from [] broad conclusory allegations, that tend to suggest that Mckesson made any statements or engaged in any conduct that 'authorized, directed, or ratified' the unidentified demonstrator's act of throwing a rock at Plaintiff." (*Doe v Mckesson*, 272 F Supp 3d 841, 852 [MD La 2017] [quoting *Claiborne*].) With regard to Mckesson's subsequent statement to the New York Times, Judge Jackson found that "Mckesson's statement does not advocate—or make any reference to—violence of any kind, and even if the statement did, 'mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.'" (*Doe v Mckesson*, 272 F Supp 3d 841, 847 [MD La 2017] [quoting *Claiborne*].)

B. The Class Action Lawsuit

At roughly the 1:30 minute mark of the video, Pirro states that "DeRay Mckesson and . . . aboout 90 of the people who were protesting . . . actually got $100,000 from the City of Baton Rouge." Pirro was referring to the case *Mckesson v City of Baton Rouge*, No. 3:16-cv-00520, before Judge John W. deGravelles in the United States Court for the Middle District of Louisiana ("the Class Action"). (Affirm. in Supp., Ex. E [Class Action Settlement].)

In that action, Mckesson (along with two other putative class representatives) filed a complaint seeking class adjudication for about 185 individuals against the City and officials of Baton Rouge, Louisiana and East Baton Rouge Parish based on allegations of various constitutional and civil rights violations. (Affirm. in Supp., Ex. C [Class Action Complaint] ¶ 38.) Mckesson there alleged that he was arrested on July 9, 2016 while peaceably protesting and charged with Simple Obstruction of a Highway of Commerce, pursuant to La. R.S. 14:97, and incarcerated at the East Baton Rouge Parish Prison until the next day. (Id. ¶ 1.) Mckesson and his co-plaintiffs alleged that the Baton Rouge police used excessive force and violated their civil rights in arresting them.

On or about August 2017, the parties sought court approval of a proposed settlement of the Class Action Complaint. The memorandum submitted in support of the motion to approve the proposed settlement stated that the "total economic benefits" of the settlement to the 69 class members was approximately $136,300. (Affirm. in Supp., Ex. D [Class Action Settlement Memo] at 21.) On October 27,

2017, Hon. John W. deGravelles of the United States District Court for the Middle District of Louisiana approved a class settlement award for class members, including Mckesson (Class Action Settlement; Complaint ¶ 18.) The judgment signed by Judge deGravelles does not put a monetary approximation on the payout under settlement but refers to "compensation and reimbursements" to be received by the "70 members of the class" as being indicated in an exhibit filed under seal with the court. (Class Action Settlement ¶ 14.)

IV. Events Subsequent to Fox & Friends

On October 27, 2017, Mckesson's attorney sent Defendants a letter demanding that Pirro retract her statements on FOX & Friends and cease and desist from making further defamatory statements about him. (Affirm in Opp., Ex. L [Demand Letter].) Specifically, Mckesson demanded that Pirro say:

> "'I retract my statement that
> [1.] DeRay Mckesson directed the violence in Baton Rouge. He did not cause any violence and
> [2.] no police officer was injured at his direction.
> [3.] Mr. Mckesson did not receive $100,000, but rather he and nearly 100 other individuals received a few hundred dollars each for being unlawfully arrested by the Baton Rouge Police Department'"

(Id. at 2).

Defendants did not respond to the letter, and Mckesson commenced this lawsuit on or about December 12, 2017.

In the instant complaint, McKesson alleges that the following statements are defamatory:

(1) That Mckesson "directed the violence" (Transcript of Video at 2:22-3:06);
(2) That the unidentified police officer "was injured at the direction of Deray Mckesson" (id. 4:04-07); and
(3) That "Deray Mckesson walks away with $100,000 for an organization that is amorphous" (id.).

(Complaint ¶ 29.)

Defendants Pirro and Fox News now move to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (7), arguing:

(1) That Pirro's statements are absolutely privileged as a "fair and true report" of a judicial proceeding, pursuant to Civil Rights Law § 74;
(2) That McKesson fails to allege that Defendants acted with actual malice;
(3) That Pirro's statements are non-defamatory as a matter of law, being either opinions or factually truthful; and
(4) That McKesson fails to allege special damages.

Mckesson opposes on each ground.

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

When considering a CPLR 3211 (a) (1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal "is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017] [internal citations omitted].)

> "The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all

> reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence."

(Id.)

Defamation is "the making of a false statement that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211–212 [1926].) An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant's written expression, which is libel, or by the latter's oral expression, which is slander. (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A) [Sup Ct, NY County 2009] [Gische, J.]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party without privilege or authorization (3) constituting fault as judged by, at a minimum, a negligence standard and that (4) causes special harm, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) There are four categories of statements that constitute defamation per se: "(1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a 'loathsome disease'; and (4) statements that impute unchastity to a woman." (*Nolan v State*, 158 AD3d 186, 195 [1st Dept 2018].)

Defamation must be pled with sufficient particularity to withstand a motion to dismiss. CPLR 3016 (a) expressly requires that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." (*See also Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].)

"Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985].) "The words must be construed in the context of the entire statement or

publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." (Id.; *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 250 [1991] ["It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole."].) In analyzing televised statements for alleged defamatory content, "the court must consider the program as a whole." (*Lasky v American Broadcasting Companies, Inc.*, 631 F Supp 962, 970 [SDNY 1986].) The court cannot rely solely on reading the transcript and "confine its analysis to the words alone," but rather, it must also consider the impact of the audio and video portions of the program to interpret "the meaning or meanings intended." (Id.)

The Court will review these allegedly defamatory statements in turn.

I. Statements that Mckesson "directed the violence" and that a police officer was "injured at the direction" of Mckesson.

McKesson asserts that Pirro's statements that he "directed the violence" and that a police officer was "injured at [his] direction" are defamatory per se because they amount to Pirro stating that he "committed a serious crime by directing another person to strike a police officer in the face with a rock." (Complaint ¶ 60.)

Defendants here argue that Mckesson's claim for defamation predicated on these statements must be dismissed because they are absolutely privileged as a fair and true report of a judicial proceeding pursuant to Civil Rights Law § 74. In addition, Defendants argue that Mckesson fails to assert sufficient factual allegations to establish that Defendants acted with actual malice or that he suffered special damages. Defendants further argue that Pirro's statements are "pure opinions" and therefore non-defamatory as a matter of law. Mckesson opposes Defendants on each point.

A. Civil Rights Law § 74

Section 74 of the New York Civil Rights Law provides, in relevant part, that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." (Id.) "The privilege with respect to judicial proceedings exists because of 'the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper

administration of justice.'" (*Branca v Mayesh*, 101 AD2d 872, 873 [2d Dept 1984], affd, 63 NY2d 994 [1984], quoting *Lee v Brooklyn Union Pub. Co.*, 209 NY 245, 248 [1913].) "While statutory predecessors to section 74 limited the privilege to members of the media who acted without malice, the privilege now extends to 'any person', whether or not he acts with malice." (Id.)

"For a report to be characterized as 'fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate." (*Holy Spirit Ass'n for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979].) "A fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated." (Id. [internal quotation marks and emendation omitted].)

"The test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published." (*Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 436 [1st Dept 1995].) "If the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law." (Id.)

Defendants argue that the above statements qualify for protection under Civil Rights Law § 74 because they make clear that they are stating what "the plaintiff in this case said" and what "the judge said," (Video Transcript at 2:22-3:06), and because these statements are essentially summarizing the allegations in the PO Injury Complaint, the Proposed Amended PO Injury Complaint, and Judge Jackson's decision dismissing the PO Injury Action. Defendants further argue that Pirro's statements describe the allegations as being less severe compared to those actually found in the PO Injury Complaint and the Proposed Amended PO Injury Complaint.

Mckesson opposes, arguing that Section 74 does not protect the subject statements because these statements could cause a reasonable viewer to believe that Mckesson engaged in more serious misconduct than was alleged in the PO Injury Complaint. Mckesson argues that there is no allegation in the PO Injury Complaint that Mckesson "committed any intentional act or violence against the police officer" and that the PO Injury Complaint only alleges a single cause of action for negligence. (Memo in Opp. at 21.) Mckesson further argues that Pirro made these statements notwithstanding Judge Jackson's decision dismissing the PO Injury Complaint on the grounds that it failed to allege that Mckesson made

any statements or engaged in any conduct that "authorized, directed, or ratified" the unidentified demonstrator's act of throwing a rock at Plaintiff. (*Doe v Mckesson*, 272 F Supp 3d 841, 852 [MD La 2017].) Mckesson further argues by adding her own commentary, and particularly, by stating that Judge Jackson's decision was not made "on the facts," Pirro's statements cannot be considered a substantially accurate report. As such, Mckesson argues that Pirro's statements produce a different effect on the mind of the reasonable viewer than would a report "containing the actual truth," namely that "Mckesson intentionally caused someone to [injure] a police officer." (Oral Arg. Tr. at 24:16-25:14.) To this point, Mckesson argues that numerous viewers believed that Pirro's statements conveyed defamatory facts about Mckesson, citing various news articles stating that Pirro "slandered" Mckesson. (Memo in Opp. at 23.) Lastly, Mckesson argues that Section 74 only applies to causes of action for libel, and that Pirro's statements constitute slander—and therefore are not protected by Section 74.

As a preliminary matter, this Court rejects Mckesson's argument that Section 74 does not apply to televised statements. Courts have routinely applied Section 74 to televised statements. (*See e.g. Greenberg v Spitzer*, 155 AD3d 27 [2d Dept 2017] [finding certain televised statements made by former New York Attorney General to be protected by Section 74 as substantially accurate reports and others to present factual questions as to their substantial accuracy]; *Dimond v Time Warner, Inc.*, 119 AD3d 1331, 1333 [4th Dept 2014] [holding that televised statement was entitled to the absolute privilege set forth in Civil Rights Law § 74].)

Looking and listening to the televised segment as a whole in reference to the PO Injury Complaint, the Proposed Amended PO Injury Complaint and Judge Jackson's decision dismissing said complaint, this Court finds that Pirro's statements describing the PO Injury Action qualify as a substantially accurate report of a judicial proceeding for purposes of Civil Rights Law § 74, and therefore are absolutely privileged from liability for defamation.

The thrust of Mckesson's argument is that Pirro's statements are defamatory because they cause the reasonable viewer to believe that "Mckesson intentionally caused someone to [injure] a police officer." (Oral Arg. Tr. at 24:16-25:14.) However, Pirro's first allegedly defamatory statement that Mckesson was "directing the violence" was part of a larger sentence that began "[a]nd yet the plaintiff in this case said," making clear that this was the plaintiff-officer's allegations. While a source attribution for the second allegedly defamatory statement that the plaintiff-officer "was injured at the direction of Deray Mckesson" is not *within that particular sentence*, the reasonable viewer, viewing

the segment as a whole, would recall the prior source attribution and understand that this was an allegation made by the plaintiff-officer.

Moreover, although the statement that the plaintiff-officer "was injured at the direction of DeRay Mckesson" may cause a reader to believe such if it is read in isolation, viewing the entire video sequence as a whole it is clear that Pirro is expressing her opinion that the plaintiff-officer should be allowed to pursue his civil complaint against Mckesson on the theory that Mckesson may be held liable for the violent events that occurred during a demonstration that he allegedly led considering the allegations of the plaintiff-officer.[5] Pirro is further stating her opinion that it is unfair that Mckesson can represent a class of persons alleging civil rights violations by the police at the Baton Rouge Protest and achieve a class settlement award in that Class Action claiming it was a peaceful protest, but that the plaintiff-officer cannot proceed with a personal injury lawsuit against Mckesson for the injuries he received by a protester at that same demonstration claiming it was a violent demonstration.

There is no suggestion that any of the hosts in the video sequence were present at the Baton Rouge Protest or possessed certain information about events surrounding the unidentified plaintiff-officer's injuries that was not public information. Indeed, Steve Doocey describes the alleged violence as "a police officer … was at a demonstration where he was injured by somebody [who] threw a rock or a bottle or something like that[,]" suggesting much is unclear about how the attack on the officer unfolded, except that it occurred during the protest.

Furthermore, while the word "directed" was not used in the PO Injury Complaint, the specific word "directed" was used in the Proposed Amended PO Injury Complaint. (PO Injury Complaint ¶ 19; Amended PO Injury Complaint ¶ 65.) By stating that Mckesson "incited the violence" and that "the member" who threw the rock was under his "custody and control[,]" the PO Injury Complaint alleges, in sum and substance, that Mckesson directed the violence at issue—notwithstanding that these allegations were found to be too conclusory and lacking in factual detail to allow the plaintiff-officer's action to go past the pleading stage. (PO Injury Complaint ¶¶ 19, 37.) Although Pirro used a word that was not used in the PO Injury Complaint, such minor imprecision in word choice is acceptable under Section 74—especially here when the word was used in the Proposed

[5] Clearly, based on the seminal case of *NAACP v Claiborne Hardware Co.*, (458 US 886 [1982]), this theory of liability fails as a matter of law absent non-conclusory, factual allegations that the organizer "authorized, directed, or ratified" a particular violent action.

Amended Complaint. As the seminal case *Holy Spirit Ass'n for Unification of World Christianity v New York Times Co.* explains:

> "When determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author. Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the words used."

(49 NY2d 63, 68 [1979].) Moreover, the Proposed Amended PO Injury Complaint actually stated that Mckesson "authorized, *directed*, and ratified specific tortious activity, which would justify holding him responsible for the consequences of that activity" and "was *directing* the activity of the protestors to incite lawless actions, including blocking of a public highway and allowing protestor to the throw objects at the police, which justifies holding him liable for the unlawful conduct that cause injuries." (Proposed Amended PO Injury Complaint ¶¶ 65-66 [emphasis added].)

In addition, Mckesson's argument that Pirro refers to him as "directing the violence" as being a "fact"—rather than an allegation—is simply not supported by the record. To repeat, Pirro's first allegedly defamatory statement that Mckesson "directed the violence" was preceded by the phrase "the plaintiff in this case said" indicating that this allegation came from the PO Injury Action. Further, as will be discussed in the next section, to the extent that Pirro is not simply restating the plaintiff-officer's allegations when she later says "[y]ou've got a police officer who was injured, he was injured at the direction of Deray Mckesson" that statement is a non-actionable statement of opinion.

Lastly, that the plaintiff-officer's complaint was dismissed and leave to serve the amended complaint was denied does not change this Court's analysis regarding the applicability of Civil Rights Law § 74. The dismissal of a complaint does not mean that a news organization—or any entity for that matter—loses the protections of Civil Rights Law § 74 in reporting on the allegations in that dismissed complaint. The question before this Court is whether Pirro's statements were "substantially accurate" in describing the allegations in the PO Injury Action and Judge Jackson's decision to dismiss said action. This Court finds that Pirro's

report regarding the allegations and the decision, viewed in the context of the whole segment, is substantially accurate.

Accordingly, the Court finds that Pirro's statements that Mckesson "directed the violence" and that a police officer was "injured at [his] direction" are absolutely privileged from liability for defamation pursuant to Civil Rights Law § 74.

B. Opinion

"Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue." (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *see also Gross v New York Times Co.*, 82 NY2d 146, 152-53 [1993] ["Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action." [internal quotation marks omitted].) However, "[w]hile a pure opinion cannot be the subject of a defamation claim, an opinion that "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it ... is a 'mixed opinion' and is actionable." (*Davis v Boeheim*, 24 NY3d 262, 269 [2014], quoting *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986].)

"A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts." (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986].) "The actionable element of a 'mixed opinion' is not the false opinion itself--it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." (Id. at 290.)

As the Court of Appeals notes, "[d]istinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task." (*Brian v Richardson*, 87 NY2d 46, 51 [1995].) This difficult task is further complicated by "the principal duty of the courts to reconcile the individual's interest in guarding his good name with cherished First Amendment considerations." (*Frank v Natl. Broadcasting Co., Inc.*, 119 AD2d 252, 256 [2d Dept 1986].)

To determine if a statement is a protected "pure opinion" or is an unprotected "mixed opinion" implying defamatory facts, a court must conduct the following four-factor analysis:

> "(1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."

(*Steinhilber v Alphonse*, 68 NY2d 283, 292 [1986] [internal quotation marks omitted].)

In conducting such analysis, the courts are admonished to avoid "the hypertechnical parsing of written and spoken words for the purpose of identifying possible facts that might form the basis of a sustainable libel action." (*Gross v New York Times Co.*, 82 NY2d 146, 156 [1993] [internal quotation marks and emendation omitted], quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 256 [1991].) At the same time, courts must take care not to "strain to read [the language] as mildly as possible." (*Weiner v Doubleday & Co., Inc.*, 74 NY2d 586, 592 [1989].) The "core goal" behind such an "exercise" is "to protect the individual's historic right to vindicate reputation without impairing our cherished constitutional guarantee of free speech or casting a pall over citizens' ability to engage in robust debate through the print and broadcast media." (*Gross*, 82 NY2d at 156.)

Here, the language that Mckesson "directed the violence" lacks a precise meaning and it is not a statement that is capable of being proven true or false. For example, Pirro's statement, in the abstract, could mean that Mckesson "directed the violence" by being the leader of a protest that turned violent; or it could mean that he "directed the violence" by generally directing or inciting others to commit acts of violence; or it could mean, as Mckesson argues, that Pirro was stating that he specifically directed a specific violent action—the throwing of a rock at the plaintiff-officer.

Moreover, in the context of protests, acts of violence do sometimes occur notwithstanding the diligent efforts of the organizers and police to keep the protest peaceful. After such occasions, a frequent topic of debate is often whether the organizers or the police should be considered responsible for such violence. In the particular context of the Black Lives Matter social movement, whether one views the Black Lives Matter protesters or the police as being violent at these protests is often a matter of opinion influenced by one's opinions about policing, racism, and other broader social issues.

As such, an analysis of the *Steinhilber* factors makes clear that Pirro's statement that Mckesson "directed the violence" must be understood as a pure opinion.

In addition, reviewing Pirro's statements that Mckesson "directed the violence" and that the plaintiff-officer "was injured at the direction" of Mckesson in the full context of the video sequence and the broader social context, it is clear that—to the extent she is not describing the allegations—Pirro is expressing a pure opinion that the plaintiff-officer should be allowed to pursue his civil complaint against Mckesson on the theory that Mckesson may be liable for the officer's injuries as the ostensible leader of the protesters. She is likewise further expressing an opinion that something is "wrong with this country" because whereas the plaintiff-officer cannot proceed against the Black Lives Matter movement because it is too "amorphous" or its ostensible leader, that same ostensible leader can serve as a class representative for similarly arrested protesters in a lawsuit against the City of Baton Rouge and achieve a class settlement.

The Court further finds that, in expressing herself, Pirro does not suggest that her opinions are based on certain facts that the listener is not aware of. On this point, Mckesson's argues that Pirro does in fact suggest that her opinion is based on undisclosed facts because she states that "[t]he problem is when you have federal judges who make decisions -- based on politics -- activist judges -- and not on the facts." Mckesson argues that this statement shows that Pirro "expressly distinguished between the basis of Judge Brian Jackson's decision and other 'facts' that she knew about the protest." (Memo in Opp. at 15.)

However, in viewing the entire sequence as a whole, there is no suggestion at any point, that any of the commentators have any kind of direct knowledge concerning the Baton Rouge Protest. There is no suggestion that any of the commentators witnessed the protest or that they spoke to sources who witnessed the protest. The only sources about the protest referenced seem to be what the

plaintiff-officer said in the PO Injury Complaint and the Proposed Amended PO Injury Complaint and what Judge Jackson said in his decision. (*Compare Greenberg v Spitzer*, 155 AD3d 27, 48 [2d Dept 2017] [finding that the defendant, the former New York State Attorney General, who "spearheaded the investigation" into accounting practices at the plaintiff-CEO's company may have caused viewers to be believe that he was asserting facts "proffered for their accuracy, rather than merely expressing an opinion about the strength of the case"].)

Moreover, rather than appearing to offer some sort of factual reporting, it is clear that Pirro was brought on the show to discuss and comment on two lawsuits relating to the Baton Rouge Protest because of her legal background. (*GS Plasticos Limitada v Bur. Veritas*, 84 AD3d 518, 519 [1st Dept 2011] ["There is no implication that the May 28 letter was based on any facts other than those included within the four corners of the complaint, thus, the statements are not actionable as 'mixed opinion' based on undisclosed facts."].)

In addition, the video shows that Pirro's facial expressions and body language are full of disdain and her delivery is at times sarcastic. Pirro makes it clear that she believes the plaintiff-officer should have been allowed to proceed with his lawsuit against Mckesson and that she would have ruled differently if she were the judge. As the two-minute sequence provides, Pirro appears to grow visibly animated, raising her voice, and accusing two federal judges of being "activist judges."

Pirro is engaging in behavior that – as her counsel points out – she has made a career of: "commentary that is often loud, caustic, and hard-hitting." (Memo. in Supp. at 18.) Indeed, Pirro's lack of temperament and caustic commentary is what she is known, celebrated, and frequently criticized for.

This Court finds that given the entire context, to the extent that Pirro is not paraphrasing the allegations in the PO Injury Action, it is clear that the allegedly defamatory statements that Mckesson "directed the violence" and that the plaintiff-officer "was injured at [his] direction" are Pirro's non-actionable statements of opinion. (*Steinhilber v Alphonse*, 68 NY2d 283, 292 [1986] ["[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate the use of epithets, fiery rhetoric or hyperbole."] [internal quotation marks and emendation omitted]; *see also Behr v Weber*, 172 AD2d 441, 443 [1st Dept 1991] [finding statements on talk show to be protected expressions of opinion]; *Huggins v Povitch*, 24 Media L Rep

2040 [Sup Ct, New York County 1996] ["The talk show format provides a forum for debate of public issues and the expression of opinion."].)

Lastly, Mckesson's argument that numerous media articles "understood Ms. Pirro's statements as defamatory" is unavailing. That these articles used the terms "defamation" and "slander" in a rhetorical sense to criticize Pirro's remarks does not establish that Mckesson has a legally cognizable cause of action for defamation. (*See Jacobus v Trump*, 55 Misc 3d 470, 484 [Sup Ct, NY County 2017] [Jaffe, J.] ["[T]hat others may infer a defamatory meaning from the statements does not render the inference reasonable under these circumstances."], *affd*, 156 AD3d 452 [1st Dept 2017], lv to appeal denied, 31 NY3d 903 [2018].)

That the Court finds Pirro's statements to be protected statements of opinion does not mean this Court agrees with Pirro's opinions or condones her behavior or rhetoric. This Court is not blind to the undertones present in this segment. Certainly, one might ask why the segment chose only to present a photograph of Judge Jackson, who is black, and not a photograph of Judge deGavrelles—who is white and oversaw the Class Action where, according to Pirro, Mckesson "walked with $100,000 for an organization that is amorphous."

However divisive one might find the subject two-minute sequence, the law of this state protects the expressions of opinion it presents. As the Court of Appeals explained decades ago:

> "To be independent of political influence, to inform the reading public on matters of concern and interest, and to perform its important, yet informal, task, especially valued in this decade, of light-shedding on the activities of government officials, the press must be safeguarded from crippling libel suits, brought to punish those who exercise free speech and to deter others, by chilling the atmosphere, from expressing disagreement in public forums. To be sure, the standards enunciated in the *Times* case are strict. But laxity is not permitted here, because under Federal constitutional principles, loose rules and only casual judicial review with a bias toward the tort plaintiff would hamper the operations of the free press.
>
> These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full

> and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."

(*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 384-85 [1977]; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 138 [1992] ["[W]hen the rules of defamation are drawn too finely, when any erroneous statement is likely to open the statement maker to liability, First Amendment values suffer because would-be communicators, fearing lawsuits, may be reluctant to risk expressing themselves.]; *see also Gertz v Robert Welch, Inc.*, 418 US 323, 339-40 [1974] ["Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."].)

Accordingly, for the foregoing reasons, this Court finds that the alleged defamatory statements that Mckesson "directed the violence" and that a police officer was "injured at the direction" of Mckesson are statements of opinion and therefore are non-actionable as a matter of law.

II. Statements that "Deray Mckesson walks away with $100,000 for an organization that is amorphous"

Turning now to the portion of Pirro's commentary in which she states "DeRay Mckesson walks away with $100,000, for an organization that is amorphous," the Court acknowledges that Pirro misstates several facts here. First, she refers to an incorrect figure. A copy of the final Class Action settlement agreement is not provided to the Court; however, plaintiff asserts in the complaint that the Class Action was settled for $136,300. (Complaint ¶ 18). In Mckesson's opposition papers, Mckesson argues that at the time of Pirro's statement the class settlement had not yet been approved and the class was to receive $46,600 under a proposed class settlement.

The document that both Mckesson and Pirro rely on here is a memorandum submitted in support of the motion for final approval of the settlement in the Class Action Lawsuit. (Affirm in Supp., Ex. D [Class Action Settlement Memo].) The memorandum states that the proposed settlement contemplates each class member receiving payments of $500, $750, or $1,000 based on the number of days the class member spent in custody, and that class members will also be reimbursed for costs associated with making bail. (Class Action Settlement Memo at 21.) The

memorandum estimated that the "total payments to the class members, return of cash bonds and reimbursement of bonds fees will be about $46,600." (Id. at 10.) In addition, the memorandum states that because the class members would not have to pay expungement and legal fees, "the total economic benefit" to the class from the settlement would be "approximately $136,300." (Id.)

Certainly, Mckesson did not "walk away" with $100,000 for himself or for the Black Lives Matter movement. This "walks away" statement must be read in context of the whole segment in which Pirro earlier said that: "DeRay Mckesson and several -- I think it's about 90 of the people who were protesting ... actually got $100,000 from the City of Baton Rouge because Baton Rouge they said was very offensive to them and they -- the police were militarized. And although no one was injured ... they felt that their civil rights were violated." Ultimately, Mckesson did serve as a named plaintiff in the Class Action and the parties submitted a proposed settlement with a "total economic benefit" of approximately $136,300 to the class members. As such, Pirro's statements in the context of the whole segment are substantially accurate for the purpose of receiving the protection of Civil Rights Law § 74. (*Holy Spirit Ass'n for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979].) That this settlement had been agreed to between the parties—but not yet approved by the court—and that Pirro reported a lower settlement amount are details that would not produce a different effect on the listener's mind than if they if they had been reported accurately. (*See Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 436 [1st Dept 1995].) In addition, that Pirro referred to Mckesson as "walk[ing] away with 100,000, for an organization that is amorphous" is but rhetorical hyperbole, and cannot be reasonably understood by a viewer to mean that the award was solely going to McKesson or to Black Lives Matter, given Pirro's earlier statement that this settlement was being awarded to Mckesson and "90 of the people who were protesting."

Accordingly, for the foregoing reasons, this Court finds that this statement that "Deray Mckesson walks away with $100,000 for an organization that is amorphous" is part of a substantially accurate report of a judicial proceeding for purposes of Civil Rights Law § 74, and therefore are absolutely privileged from liability for defamation.

III. Allegations of Malice and Special Damages

As this Court finds that the alleged defamatory statements do not give rise to claims for defamation, this Court need not consider Defendants' other arguments for dismissal, including the arguments that Mckesson has not adequately pled the requisite level of malice or special damages.

CONCLUSION

Accordingly, it is herby

ORDERED that the motion of Defendants Jeanine Pirro and Fox News Networks, LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that said Defendant is directed to serve a copy of this order upon the Clerk of the Court with notice of entry within twenty (20) days of the date of this order; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

The foregoing constitutes the decision and order of the Court.

3/21/2019
DATE

HON. ROBERT D. KALISH J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE